

May 14, 2008

The Honorable Richard Eckstrom
Comptroller General, State of South Carolina
305 Wade Hampton Office Building
1200 Senate Street
Columbia, South Carolina 29201

Dear Mr. Eckstrom:

By your letter, you informed us that

[t]he Governor issued an Executive Order No. 2007-14, filed August 30, 2007 which directs public disclosure of all expenditures of state funds by agencies reporting to our Office through the Statewide Accounting and Reporting System (STARS). This Executive Order asks agencies to provide certain detail on their spending of public funds by posting this detail on a searchable website made available to the public at no cost in order to increase spending transparency. My Office is already collecting this type of expenditure data through STARS and is able to provide this information to the public on behalf of STARS agencies, which includes the General Assembly and the Judicial Department. We have posted this data on-line as requested by the Executive Order.

We have been informed by the Legislative Printing, Information and Technology Systems, a division of the General Assembly, that “the governor’s executive order regarding spending and transparency does not apply to the legislative branch of government.” This legislative division has directed that all expenditure data related to “legislative departments” be removed from the spending transparency website “immediately.”

Thus, you request an opinion on “whether there is any legal basis to support this legislative division’s request that all spending data related to legislative departments be removed from the Spending Transparency website”

Law/Analysis

Pursuant to Article I, section 8 of the South Carolina Constitution (1976):

In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.

Accordingly, the Governor has no authority over the Legislature and those bodies under its authority.

Nonetheless, under South Carolina's Freedom of Information Act ("FOIA"), "[a]ny person has the right to inspect or copy any public record of a public body, except as otherwise provided by § 30-4-40, in accordance with reasonable rules concerning time and place of access." S.C. Code Ann. § 30-4-30(a) (2007). The Legislature and divisions of the Legislature are public bodies. Thus, the Governor, like any other individual, may request public information maintained by the Legislature or the Legislative Printing, Information and Technology Systems division of the Legislature.

However, according to your letter, you are not concerned with whether the Governor may request information directly from the Legislature or more particularly the Legislative Printing, Information and Technology Systems. Rather, the information in dispute involves information held by your office, which you wish to provide to the public in accordance with the Governor's order.

Section 30-4-15 of the South Carolina Code (2007) provides the following purpose for FOIA:

The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

"The purpose of FOIA is to protect the public by providing a mechanism for the disclosure of information by public bodies." Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006). Furthermore, as stated by our Supreme Court in New York Times Co. v. Spartanburg

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County School Dist. No. 7, 374 S.C. 307, 311, 649 S.E.2d 28, 30 (2007), “FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature.”

Section 30-4-20(a) of the South Carolina Code (2007) defines public bodies as including “any department of the State” Certainly, the Comptroller General’s Office is a public body pursuant to this provision. Section 30-4-20(c) defines “public record” as including “all books, papers, maps, photographs, cards, tapes, recordings, or other documentary materials regardless of physical form or characteristics prepared, owned, used, in the possession of, or retained by a public body.” In addition, as you point out in your letter, section 30-4-50(A)(6) specifically includes “information in or taken from any account, voucher, or contract dealing with the receipt or expenditure of public or other funds by public bodies . . .” as public information subject to disclosure under FOIA. STARS essentially involves the recording and tracking of expenditures of state funds by its participating agencies. You stated in your letter that your office collects and maintains this data for STARS agencies including Legislative Printing, Information, and Technology Systems. We did not find a provision under section 30-4-40 of the South Carolina Code exempting STARS records from disclosure. Thus, we are of the opinion that the data produced by STARS falls within the definition of a public record and appears to be public information pursuant to section 30-4-50. Accordingly, we opine that the STARS data is subject to FOIA. Therefore, anyone requesting such information from the Comptroller General’s Office, including the Governor, is entitled to such information.

We understand that your office has been disclosing and would like to continue disclosing such information in accordance with the Governor’s Order. However, the Legislative Printing, Information and Technology Systems desires such information be removed from the website. According to our Supreme Court in Bellamy v. Brown, 305 S.C. 291, 408 S.E.2d 219 (1991), FOIA does not establish a duty of confidentiality. Even if a person or persons should request that certain records remain confidential, the agency may not withhold the records on this basis; a legally established exemption must be applicable to the records in question. Moreover, even if we presume that a particular piece of information is exempt from disclosure under FOIA, your office may, nevertheless, disclose such information. Thus, we believe that not only is the information requested in the Governor’s order required to be disclosed under FOIA, if such information is in some way exempt from disclosure, your office does not have to keep it confidential and may disclose this information to the public.

Conclusion

Based on our understanding of the data generated by STARS, which is maintained by your office, we are of the opinion that this information is public information disclosable to the public upon request. We certainly recognize, based upon the constitutional principle of separation of powers, that the Governor has no authority over the Legislature or any division under its supervision,

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or over the judiciary. However, the issue here is not separation of powers or even the force and effect of the Governor's executive order. Instead, the question is whether FOIA requires release of the information in question. We believe it does.

In this instance, you indicate that the legislative and judicial departments are participating STARS agencies. Moreover, you indicate that you posted the expenditure information online at the request of the Governor. The posted information is public information and must be disclosed to the public unless an applicable FOIA exemption is identified. Finally, because FOIA does not provide a duty of confidentiality with regard to public information, we believe your office may disclose the information in its possession, including information concerning a division of the Legislature.

Very truly yours,

Henry McMaster
Attorney General

By: Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:

Robert D. Cook
Deputy Attorney General